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In the Supreme Court of the United States

OCTOBER TERM, 1975

NORTHERN INDIANA PUBLIC SERVICE COMPANY,
PETITIONER

v.

PORTER COUNTY CHAPTER OF THE IZAAK WALTON LEAGUE OF AMERICA, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AND THE NUCLEAR REGULATORY COMMISSION

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1. The Court of Appeals for the Seventh Circuit set aside an administrative decision granting a permit to construct a nuclear power plant (the "Bailly plant") on the southern shore of Lake Michigan, on a site already occupied by two fossil fuel generating plants. The permit had been issued to the Northern Indiana Public Service Company (NIPSCO) by the Atomic Energy Commission (AEC).[1]

[1] The Nuclear Regulatory Commission (NRC) succeeded to the AEC's licensing powers on January 19, 1975. Energy Reorganization Act of 1974, Pub. L. No. 93–438, 88 Stat. 1233–1254. See 40 Fed. Reg. 3242, 3520.

The court's decision was based on its conclusion that the AEC had failed to follow its own regulations prohibiting the location of nuclear power plants within certain radii of population centers (Pet. App. 9–16). These regulations require three buffer zones for a reactor, including an area designated as the "low population zone."[2] Under the regulations, the size of this zone is calculated with reference to each particular plant's safety system and the site's physical characteristics (10 C.F.R. 100.10; Pet. 4–5); it must be large enough so that in the event of a major accident, individuals outside it would not receive a total radiation dose to the whole body in excess of 25 rem (10 C.F.R. 100.11(a)(2); Pet. 6).[3] The regulations also require that a minimum distance be kept between the plant and "the nearest boundary of a densely populated center containing more than about 25,000 residents" (10 C.F.R. 100.3(c), 100.11(a)(3); Pet. 3–6). This distance must be "at least one and one-third

[2] An applicant for a license must show that adequate measures can be taken to protect people within the low population zone (10 C.F.R. 100.3(b), 100.11(a)(2); Pet. 5–6).

[3] One rem is the dose of ionizing radiation that will produce a biological effect equivalent to that produced by one roentgen of gamma-ray radiation. Exposure of the whole body to a dose of 25 rem will ordinarily produce no discernable physical symptoms. Such symptoms from radiation exposure do not usually appear until a dose of at least 100 rem has been received (450 rem is considered a lethal dose). No accident capable of releasing radiation sufficient to produce a whole body exposure of 25 rem has yet occurred in or around an operating nuclear reactor. Its probability is now estimated as one chance in each 1,000 years of reactor life. If such an accident were to occur, the chances are even less that there would actually be such a release.

times the distance from the reactor to the outer boundary of the low population zone" (10 C.F.R. 100.11(a)(3); Pet. 5–6). In this case, the outer boundary of the low population zone was established 1.5 miles from the Bailly plant, and therefore no densely populated center could be within two miles of the plant.

The political boundary of the City of Portage, Indiana, is approximately one mile from the proposed site of the Bailly plant (Pet. App. 13).[4] Under the regulations, distance is measured by reference to "the nearest boundary of a densely populated center," 10 C.F.R. 100.3(c), with due consideration of the "population distribution within the population center" (10 C.F.R. 100.11(a)(3); Pet. 5–6).[5] The record shows that the area of Portage within two miles of the proposed site of the Bailly plant is principally industrial, and has no prospects for substantial residential growth. The densely populated area of Portage starts 4.5 miles from the proposed site (Pet. App. 38 (dissenting opinion); see also Pet. App. 55).

The Atomic Safety and Licensing Board of the AEC[6] considered the distance between the proposed

[4] Portage, which had a population of 19,000 in 1970, was treated as a densely populated center because its population is expected to exceed 25,000 by 1980 (Pet. App. 12–13).

[5] This regulatory language has since been amended. See *infra*, p. 5.

[6] The Atomic Safety and Licensing Board consists of a lawyer chairman and two members with technical expertise appropriate to the issues to be decided in the proceeding. 42 U.S.C. 2241. The Board is vested with the full adjudicatory authority of the Commission, being empowered to issue immediately effective initial decisions in licensing proceedings. Such

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site and the nearest heavily populated portion of Portage, and concluded that the proposed site was not within two miles from a densely populated center (Pet. App. 55). In so concluding, the Board applied the established Commission interpretation of the rule, that is, that the boundary of the densely populated center was controlled by actual population distribution rather than political boundaries, despite the contention of respondent Porter County Chapter (which had intervened in the proceeding in opposition to the application for the construction permit) that political boundaries must control. The issue was not timely raised before the Atomic Safety and Licensing Appeal Board of the AEC, which did not specifically consider the issue (Pet. App. 197).

In reversing the grant of the construction permit, the majority below interpreted the regulation concerning the "boundary of a densely populated center containing more than about 25,000 residents" (10 C.F.R. 100.3(c); Pet. 3–4) to mean the *political* boundary of the population center. As noted above, the political boundary of Portage, Indiana, is closer than the requisite two miles from the reactor site. For this reason, the court considered the construction permit to have been improperly granted (Pet. App. 9–16).[7] It accordingly set aside the AEC decision and

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decisions are appealable to an Atomic Safety and Licensing Appeal Board (also composed of legally and technically trained members) and are thereafter subject to discretionary review by the Commission itself.

[7] The court did not pass on the non-federal respondents' many other objections to the issuance of the construction permit (Pet. App. 17–33).

ordered the power company to fill in the existing excavation at the site.

With one judge disqualified, the court voted 4–3 in favor of the petition for rehearing *en banc* on May 28, 1975, but in accordance with the court's interpretation of the statute authorizing rehearing *en banc* (28 U.S.C. 46(c)), this had the effect of a denial.[8] In its order upon denial of the petitions for rehearing, the two-judge panel majority stated that nothing in its decision would prevent the applicant from applying for, or the Nuclear Regulatory Commission from considering an application for, a new license (Pet. App. 41).

On June 20, 1975, the NRC issued an interpretative ruling to make clear that in defining population center boundaries as required by its regulations, consideration "has not been confined to the location of the political or corporate boundary of the population center, but distribution of people within and even beyond the political or corporate boundary has been given even greater significance" (40 Fed. Reg. 26526, 26527). The rule and the Statement of Considerations that accompanied it are reprinted as Appendix A to this memorandum.

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[8] The position of the Seventh Circuit, in conflict with at least one other on this point (Rule 7, United States Court of Appeals for the Eighth Circuit Rules, as amended to October 15, 1974), is that disqualified judges are to be counted in determining the size of the majority required to authorize rehearing *en banc*. See 28 U.S.C. 46(c).

2. We agree with petitioner that the decision below is wrong. AEC's interpretation of the regulations in question was reasonable and has been consistently applied. The obvious purpose of the regulations is to create a buffer zone separating nuclear power plants and concentrations of populations. For this reason, AEC applied the regulations by reference to population concentrations rather than, as the court did, by reference to political boundaries alone. In the past, the corporate or political boundary of a population center has been used in determining the population center distance only in cases where the remoteness of the proposed nuclear power site made a more precise determination unnecessary. 40 Fed. Reg. 26526. Otherwise, population center distance has been based on the distance to the population concentration, not to the political boundaries of the population centers when these are closer to the proposed site. *Consolidated Edison Company of New York, Inc.*, 5 AEC 43, 45; *Consumers Power Company*, 5 AEC 214, 218. See also *Southern California Edison Co.*, ALAB 248, RAI–74–12–957, 960–961 (population center extended beyond political boundaries in view of projected population growth).[9]

[9] The majority below agreed that the Commission correctly applied the population center distance in the *Southern California Edison* case (Pet. App. 14–15), but refused to accept the same rationale here, where the population concentration could not be expected to reach the political boundaries. In both instances, the Commission based its calculations on the actual location of populated areas rather than on the political boundaries, which may be set for a host of reasons unrelated to population density.

The Act itself is silent about where nuclear plants must be located in relation to concentrations of population. The court of appeals was thus not faced with an agency's interpretation of a statute it administers; the question presented concerned the agency's interpretation of its own regulation, a regulation the AEC had devised and promulgated in order to assure the public safety. In this situation, where the AEC's construction of its own regulation has a rational basis and has been consistent, it is improper for a court to substitute its judgment for that of the agency. *Ehlert v. United States*, 402 U.S. 99, 105. See also *Power Reactor Co.* v. *Electricians*, 367 U.S. 396, 408; *Udall* v. *Tallman*, 380 U.S. 1, 16–17; *United States* v. *City of Chicago*, 400 U.S. 8, 10.

Yet, that, we submit, is what the court below did in this case and it is difficult to perceive any basis for the court's disagreement with the AEC's view of the regulation. The court points out, adding the italics, that the AEC had defined "population center distance" from the reactor "to the nearest *boundary* of a densely populated center * * *" (10 C.F.R. 100.3(c); Pet. App. 14). The court expressed agreement with the AEC that the boundary of a population center for these purposes can exceed the political or corporate limits (*id.* at 14–15). Yet unaccountably the court appears to reason that when the population is concentrated inside the political or corporate limits, it would then be "ludicrous" to use the boundary of the population center because the court believed this to be too "vague and indefinite" to measure (*id.* at 15–16). The

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court fails to explain why the boundaries of the population center are acceptable reference points whenever they exceed the corporate limits of the city or town but are unacceptable when they do not. Moreover, there is nothing to support the court's apparent conclusion that population center must refer to political limits because otherwise the boundary of the population center here was not capable of being determined. The record in this case shows that the AEC did in fact make such a determination.[10] In any event, the

[10] At the hearings, a witness from the Commission's staff explained that the boundary of the densely populated area was determined by reference to United States Geological Survey maps (Tr. 6376):

"The Regulatory Staff does not use political boundaries or legal boundaries in its evaluation with respect to population distributions. What we do use is that area, or that boundary where the population density takes a substantial increase. And that substantial increase we define as the pink tinted areas in the U.S. Geological Survey map.

"Now the definition of pink tinted areas here by the Geological Survey is that population density which is too [dense] to indicate the individual houses by themselves. And the reason for that is that if you were to indicate the individual houses there would be no opportunity to indicate the other significant landmarks."

This explanation is supported by the Geological Survey pamphlet, "Topographic Instructions" (Staff Exhibit 9; Tr. 9413), which defines an urban area as (page 7, paragraph 16): "a congested built-up area where all buildings cannot be shown in their true position because of map scale. If all buildings were mapped, other more valuable map information such as landmark buildings, street names, and contour lines would be obscured. Urban area does not refer to political boundaries or legal designations."

The court's rejection of the above evidence (Pet. App. 15–16) was error; as the dissent correctly notes, "[i]t was for the agency and not this court to weigh and appraise that evidence"

court's concerns are administrative ones and cannot serve as a proper basis for refusing to accept the AEC's construction.

Indeed, even if the regulations had been ambiguous and the past constructions of the agency could be ignored, the appropriate relief would have been a remand for clarification of the regulations and their applicability to this particular plant site. Cf. *United States* v. *Sasketchewan Minerals*, 385 U.S. 94; *Arrow Transp. Co.* v. *Cincinnati N. O. & T. Pac. R.*, 379 U.S. 642; *Federal Power Commission* v. *Idaho Power Co.*, 344 U.S. 17, 20; *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 145–146. Remand would have been particularly appropriate here in view of three other factors: (1) respondents' failure to pursue the population center boundary issue in timely fashion before the AEC Appeal Board[11] deprived that Board of an opportunity to consider the question in light of the participants' arguments;[12] (2) the NRC, a new regulatory body, established between the time the AEC Appeal Board acted and the decision below, should have had an opportunity to consider any dispute as to the meaning of the regulation, which is entirely within agency dis-

(Pet. App. 38). Accord, *Merchants Warehouse Co.* v. *United States*, 283 U.S. 501, 508; *Virginian Ry.* v. *United States*, 272 U.S. 658, 663.

[11] The Commission regulations require preservation of issues on review. 10 C.F.R. 2.762.

[12] See *United States* v. *Tucker Truck Lines, Inc.*, 344 U.S. 33, 36–37; *United States* v. *Hancock Truck Lines, Inc.*, 324 U.S. 774, 778–780; *Macauley* v. *Waterman S.S. Corp.*, 327 U.S. 540; *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50–51.

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cretion since no statute requires a nuclear plant to be located a minimum distance from populated areas; and (3) the agency has had no opportunity to explore the possibility that the proposed Bailly design included (or could be amended to include) sufficient safety features to satisfy even the political boundary test adopted by the panel majority.

3. For the reasons stated, we believe the decision below is wrong. While we have not petitioned for certiorari, in light of the subsequent amendment of the regulation interpreted by the court below, we nevertheless believe that there are substantial grounds supporting the petition that has been filed. The effect of the decision, even though limited by the new regulation to the case at bar, is serious. In its order denying rehearing, the panel indicated that any further proceedings before the NRC would require the filing of a new application (Pet. App. 41). We estimate that the difference between the filing of a new application and the continuation of the current proceeding is about 3 years' delay.[13] At present fuel prices, loss of

[13] Any new application would have to be thoroughly revised to meet the current requirements regarding contents and format of such applications—requirements which have markedly changed since the original 4,700 page Bailly construction permit application was filed on August 28, 1970. It would take petitioner at least twelve months to prepare a new application. A minimum of two more years would then be consumed in required review and hearings leading to reissuance of a construction permit. The new application must be extensively reviewed by the Commission's staff and the Advisory Committee on Reactor Safeguards (a group of independent experts required by the Atomic Energy Act to report to the Commission on each application, 42 U.S.C. 2039, 2232(b)). This intensive examination must then be followed by adjudicatory hearings before a Licensing Board. There were more than 70 days of hearings on the original application. The record, which exceeded 30,000 pages, was then reviewed by the Appeal Board. The entire review process consumed three years and eight months; our estimate that it can be repeated in two years is optimistic.

The additional three years of effort for preparation and review of a new application would not produce a corresponding increase in safety, since, under the Commission's two-step licensing process, petitioner will in any event be obliged to demonstrate compliance with then-existing safety criteria when it applies for an operating license after construction is completed.

the Bailly plant's generating capacity for three years can be expected to cost petitioner's consumers at least $60 million in excess fuel costs.[14] In view of the current and projected fuel shortage, such unnecessary expenditures are doubly undesirable.

4. For the foregoing reasons, we concur in petitioner's suggestion (Pet. 23–24), that it would be appropriate for this Court to reverse summarily or to vacate and remand to the court below for reconsideration in

[14] This estimate assumes that coal will be used as the replacement fuel. If oil is used, the cost could exceed $200 million. A 685 MW nuclear power plant, such as Bailly, operating at an average 60% capacity produces about 11 billion kilowatt hours in three years. Our estimate of coal differential costs is based upon spot prices for coal in Indiana in March 1975 averaging 85¢ per million BTU. With the heat rate of about 10,000 BTUs/KW hr., the fuel cost component is in the range of 8 to 9 mills/KW hr. Nuclear fuel costs are in the range of 3 mills/KW hr., resulting in a differential cost between coal and nuclear power of about 6 mills/KW hr. For oil of average heat content at $13.00 per barrel the fuel cost would be about $2.30 per million BTUs and the fuel cost component of electric power would be in the range of 23 mills per kilowatt hr. With nuclear fuel costs of 3 mills/KW hr., the differential cost between nuclear and oil is about 20 mills/KW hr.

light of the NRC's interpretative regulation of June 20, 1975. See, *e.g.*, *Thorpe* v. *Housing Authority*, 393 U.S. 268, 281.

Respectfully submitted.

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Solicitor General.

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General Counsel,
Nuclear Regulatory Commission.

AUGUST 1975.

APPENDIX A

TITLE 10—ENERGY

CHAPTER I—NUCLEAR REGULATORY COMMISSION

PART 100—REACTOR SITE CRITERIA

Population Center Distances

Since their promulgation by the Atomic Energy Commission (AEC) in April, 1962, the site criteria set forth in 10 CFR Part 100 have served as the framework for evaluations of proposed sites for stationary power and test reactors from the standpoint of protection of the health and safety of the public. Part 100 includes three quantitative site criteria centered around the concepts of: an "exclusion area" surrounding the reactor in which, subject to certain exceptions, the licensee has the authority to determine all activities including exclusion or removal of personnel and property, 10 CFR 100.3(a); a "low population zone" immediately surrounding the "exclusion area" which contains residents the total number and density of whom are such that there is a reasonable probability that appropriate protection measures could be taken in their behalf in the event of a serious accident, 10 CFR 100.3(b); and a "population center distance" which is defined as "the distance from the reactor to the nearest boundary of a densely populated center containing more than about 25,000 residents" 10 CFR 100.3(c). Under Part 100, site suitability is strongly dependent upon whether certain calculated doses from postulated hypothetical aceidents at the

boundaries of the "exclusion area" and "low population zone" are within specified dose guideline values, 10 CFR 100.11(a) (1) and (2), and whether the "population center distance" is at least one and one-third times the distance from the reactor to the outer boundary of the low population zone, 10 CFR 100.11 (a)(3).

As the Statement of Considerations which accompanied publication of the effective Part 100 in the FEDERAL REGISTER indicated, the effective Part was intended to reflect current AEC siting practices. The Statement of Considerations indicated a concern on the part of the AEC with cumulative exposure dose to large numbers of people as a consequence of nuclear reactor accidents. The population center distance criterion in 10 CFR 100.11(a)(3), in particular, was added to the effective Part in order to provide additional protection to people in large centers (27 FR 3509, April 12, 1962).

In light of this underlying concern for cumulative exposure dose to large numbers of people in population centers, the AEC has applied the population center distance criterion with a view to consideration of population distribution. Indeed 10 CFR 100.11(a)(3) specifically provides that "in applying this [population center distance] guide, due consideration should be given to the population distribution within the population center." The "boundary" of a densely populated center has been determined on a case-by-case basis. Generally, where it has not appeared that the population center distance criterion would be crucial to site suitability because the site was located far from any densely populated area, the "boundary" of the population center was, for convenience, taken as the corporate or political boundary. However, it is clear that a wide variety of political, economic, and social

factors are applied by State and local jurisdictions in selecting corporate or political boundaries. Thus, there is no necessary correlation between corporate or political boundaries and population distribution. Indeed, even if a particular corporate or political boundary had been chosen on the basis of population distribution, there would be no assurance that the boundary would continue to reflect actual population distribution. Consequently, in cases where the population center distance criterion might weigh heavily in the overall site suitability evaluation, a more refined definition of the population center boundary has been utilized. In defining the boundary, consideration has not been confined to the location of the political or corporate boundary of the population center, but distribution of people within and even beyond the political or corporate boundary has been given even greater significance.

A general examination of power reactor siting regulations and policies is underway as a separate matter. In the interim, the Commission is firmly of the opinion that continued implementation of its population center distance criterion is required. However, the recent decision of the United States Court of Appeals for the Seventh Circuit in *Izaak Walton League v. AEC*, —— F. 2d ——, No. 74-1751 (April 1, 1975), expresses the view that such implementation is inconsistent with the present language of the regulation. In that decision the Court held that while a population center boundary under the meaning of Part 100 may extend beyond the political or corporate limits because of population distribution considerations, "there is neither reason nor sound safety policy to cut down the boundaries of that unit and make some hopeless attempt to construct imaginary boundaries." Slip Opinion at 13-14. The AEC held in that licensing proceeding, and the NRC maintained before the Court on

review, that the boundary of the population center within the meaning of Part 100 must be determined in light of considerations of population distribution, rather than determined on the basis of acceptance of the political or corporate boundary.

In light of the above, the Commission wishes to amend Part 100 to restore and make clear the intended meaning of the rule. The amendment which follows provides that in applying the population center distance criterion in 10 CFR 100.11(a)(3), the "boundary" of the population center, as that term appears in 10 CFR 100.3(c), shall be determined upon consideration of population distribution (rather than determined solely upon consideration of location of the political or corporate boundaries). The proposed amendment is interpretative in nature and reflects the current and consistent siting practice of the Commission.

Pursuant to the Atomic Energy Act of 1954, as amended, the Energy Reorganization Act of 1974, and section 553 of Title 5 of the United States Code, notice is hereby given of adoption of the following amendment to 10 CFR Part 100.

Because the amendment is interpretative in nature, and merely reflects the current siting practice of the Commission, and because of the immediate adverse effect of the Bailly reading, the amendment is made immediately effective. However, the Commission is providing an opportunity for public comment upon the amendment. All interested persons who desire to submit written comments should send them to the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Attention: Docketing and Service Section, Washington, D.C. 20555, by July 24, 1975. Copies of comments received will be available for public inspection at the Commission's Public Document Room at 1717 H Street NW., Washington, D.C.

1. Section 100.11(a)(3) of 10 CFR Part 100 is revised to read as follows:

§ 100.11 Determination of exclusion area, low population zone, and population center distance.

(a) * * *

(3) A population center distance of at least one and one-third times the distance from the reactor to the outer boundary of the low population zone. In applying this guide, the boundary of the population center shall be determined upon consideration of population distribution. Political boundaries are not controlling in the application of this guide. Where very large cities are involved, a greater distance may be necessary because of total integrated population dose consideration.

* * * * *

Dated at Washington, D.C., this 20th day of June 1975.

For the Nuclear Regulatory Commission.

SAMUEL J. CHILK,
Secretary of the Commission.

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